IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2973 OF 2002

Shri Jayesh D. Dhebar .. Petitioner

versus

Aryl Pharmaceuticals & Anr. .. Respondents

...

Ms.N.D. Buch with Bina B. Dholakia for the petitioner.

Mr.Rahul Nerlekar for the respondents.

CORAM : D.G. KARNIK,J.

DATED : 8th June 2005.

P.C.:

1. By this petition, the petitioner challenges the judgement and order dated 26th March 2002 passed by the Member, Industrial Court, Mumbai dismissing

the Revision Application filed by the petitioner and thereby confirming the judgement and order passed by the 4th Labour Court, Mumbai, rejecting the relief of reinstatement in service to the petitioner.

2. The petitioner was employed as a peon in the respondent no.1 establishment of which the respondent no.2 was a partner. The principal duties of the petitioner were outdoor work including delivery of mail and documents at different addresses. The petitioner was paid salary and allowances as per the settlement between the respondent no.1 and the workers union of which the petitioner was a member. One of the allowances that was paid to the petitioner was a lunch allowance when the petitioner was required to go out for duty. For a period of about two months, prior to 13th November 1990, the petitioner was reluctant and had often refused to perform the outdoor duties. On account of persistent refusal of the petitioner to perform the outdoor duties and obey the lawful orders for outdoor duties issued to him by superiors, a show cause notice was issued to the petitioner on 13th November 1990. Thereafter, an independent enquiry Officer was appointed for enquiry into the charges of

insubordination and refusal to obey the lawful orders and perform the duties assigned to him by the superiors. The petitioner appeared in the enquiry and admitted having refused to perform the outdoor duties despite lawful orders. The enquiry Officer therefore held that the charges were proved. After notice to show cause against the proposed order, the services of the petitioner were terminated for misconduct proved in their enquiry held against him. The petitioner thereafter filed a complaint before the Labour Court, Mumbai alleging that the respondents had dismissed by way of a victimization and not in good faith but in colourable exercise of the employers' rights. He alleged that the enquiry conducted against the petitioner was in utter disregard of the principles of natural justice. The petitioner also contended that misconduct committed by him was minor and technical and having regard to the nature of the misconduct and the past record of service, the punishment of dismissal was shockingly disproportionate. The petitioner alleged unfair labour practice under clauses a, b, f and g of entry no.1 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short the "MRTP & PULP Act".

The Labour Court held that the enquiry conducted was fair and proper and the finding recorded in the enquiry were not perverse. As regards the claim of the petitioner that the respondents had committed unfair labour practices as alleged the Labour Court denied the challenge of unfair labour practice of all counts but one. The labour Court held that the model standing orders did not confer any right on the employer to suspend the employee pending enquiry, and as the respondents had suspended the petitioner pending enquiry they were guilty of an unfair labour practice under clause (b) of Entry No.1 of Schedule IV. The labour Court however held that this unfair labour practice did not confer on the petitioner a right of reinstatement. The labour Court also held that the petitioner was the only peon engaged for the purpose of outdoor duties and his refusal to perform outdoor duties despite lawful orders was a serious misconduct and the punishment awarded was not disproportionate to the misconduct. In this view of the matter, the labour Court rejected the claim of reinstatement of the petitioner. It however awarded a compensation of Rs.15,000/- to the petitioner for the technical breach of clause (b) of Entry no.1 for effecting suspension without being authorised to do

so under the model standing orders.

3. Aggrieved petitioner challenged the order of the Labour Court by filing a revision before the Industrial Court. The Industrial Court held that the Labour Court was right in not directing reinstatement of the petitioner and was right in awarding only the compensation. It further held that in any event, establishment of the respondents had been permanently closed down from 10th July 1998 and therefore, there was no question of passing an order of reinstatement. In this view of the matter, the Industrial Court dismissed the Revision Application by an order dated 26th March 2002. That order is impugned in this Writ Petition.

4. Learned counsel for the petitioner does not press the ground that the enquiry into the misconduct was not legal and valid and was contrary to the principles of natural justice. She also does not challenge the finding of fact recorded by the enquiry officer that the petitioner was guilty of a misconduct. In my view, the said challenge is rightly been given up in view of the clear admission made by the petitioner in the cross examination

before the Labour Court wherein he has admitted his guilt and has further stated that he refused to perform outdoor duties for 2 to 3 months on the ground that the lunch allowance was not adequate. The petitioner was a member of a recognised trade union. The recognised trade union had entered into a settlement which was in force and binding on the petitioner. The settlement provided not only for the scale of wages but also the scale of lunch allowance when an employee was sent for outdoor duties. The petitioner was paid lunch allowance as per the said scale. the petitioner had not complained to the recognised union that the lunch allowance was inadequate and scale should be revised. The petitioner had not even complained to the respondent no.1 in writing that the lunch allowance was inadequate and should be revised. He only refused to do the outdoor work on the ground that the lunch allowance was not adequate. Refusal was not once, but was persistent for a period of 2 to 3 months as admitted by the petitioner himself in his cross examination before the Labour Court. The petitioner also did not adduce any evidence to show that the enquiry was not proper or contrary to the principles of natural justice. In the circumstances, the Labour

Court was right in holding that the enquiry was proper and charges against the petitioner were proved.

5. Learned counsel for the petitioner strenuously contends that the punishment given to the petitioner was excessive and disproportionate to the misconduct. In my view, the view taken by the Labour Court that the punishment was not disproportionate is a correct view and in any event is a possible view. The respondent no.1 establishment was a small establishment and a partnership concern. Petitioner was the only peon employed by the respondent no.1 for outdoor duties which included the delivery of urgent mail and documents to different persons. The petitioner had consistently refused for a period of 2-3 months, to perform the outdoor duties. Learned counsel for the petitioner submits that the petitioner was justified in refusing to do outdoor work because the lunch allowance was not adequate. Complaint about the adequacy of the lunch allowance was never made by the petitioner to the respondent in writing. Furthermore, petitioner was a member of a recognised trade union. He had not even made a complaint to the recognised trade union as admitted

by him in the cross examination before the Labour Court. The recognised union of which the petitioner was a member, from time to time had entered into written settlements with the respondents and the last such settlement was made in the year 1988 and was in force. The said settlement not only provided about the scale of salary but also about the lunch allowance to be paid to the employees if they were assigned outdoor work. There is no dispute that the petitioner was being paid lunch allowance as per the said settlement. Thus, there was no legal or justifiable reason for the petitioner for his refusal to perform outdoor duties lawfully assigned to him. He refused to perform his duties and persisted with the refusal. Since he was the only person engaged for the said outdoor duties, it must have caused great inconvenience to the respondents. If an employee who refuses to obey the lawful order of his superiors persistently and without any justifiable reason is ordered to be reinstated, it may affect the very discipline in the entire organisation. In the circumstances, I concur with the view taken by the two courts below that the punishment was not disproportionate to the misconduct.

6. There are more reasons than one why I am not inclined to interfere and order reinstatement. Firstly, soon after the termination of services, the petitioner has secured gainful employment elsewhere. In paragraph no.5 of the cross examination before the Labour Court, he has admitted that he had been working with Sheth Brothers as a peon and his salary was equal to the salary which was paid to him by the respondents. Subsequently, the salary was increased. After a few years, the petitioner left the second employment, perhaps for a more lucrative engagement as a commission agent, and has been working as a commission agent since then. This is also admitted by him in the cross examination. Secondly, the Industrial Tribunal has recorded that the respondent no.1 establishment has been permanently closed down on 10th July 1998. This finding is not challenged before me. In the circumstances, there would be no question of presently granting reinstatement.

7. The petitioner has also been awarded a compensation of Rs.15,000/- for the alleged breach of the model standing order of suspension pending enquiry without lawful authority. Learned counsel for the respondents submits that clause 25(5) of the

model standing orders confers on the employer to suspend an employee pending enquiry. He therefore submits that the finding being erroneous be set aside. As the respondents have not challenged the orders of the Labour Court or the Industrial Court which have become final qua them. Hence the said orders cannot be allowed to be challenged by them. At the stage of the hearing, learned counsel for the respondent no.1 offers to pay additional amount of Rs.5,000/- ex-gratia to the petitioner. The offer is recorded. Respondent no.1 is accordingly directed to pay an additional sum of Rs.5,000/- to the petitioner within a period of eight weeks. Subject to this direction, Writ Petition is dismissed.

8. Rule discharged. No order as to costs.

D.G. KARNIK, K